

Good Faith Efforts



**Federal Aviation
Administration**

Office Of Civil Rights

*ACHIEVING SAFETY
THROUGH DIVERSITY*

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Good Faith Efforts (GFE)

Generally

- What are GFEs?
- To whom should GFEs apply?

Good Faith Efforts

Generally Applicable

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2014 DBE Regulatory Requirements

- What's new and how should it be incorporated?

Good Faith Efforts

Generally Applicable

- What are GFEs?
- To whom should GFEs apply?

2014 DBE Regulatory Requirements

- What's new and how should it be incorporated?

2011 DBE Regulatory Requirements

- What's old and how should it have been incorporated?

General Applicability

Standard for DBE Overall Program Implementation

Prime Contractors	DBE Contractors	USDOT Recipients
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Goal Setting Flash Back

Race-Neutral Measures

Race Conscious Measures



Goal Setting Flashback

Race-Neutral Measures

- Assist all small businesses to create DBE opportunities
- Maximum feasible portion of goal

Race-Conscious Measures

Goal Setting Flashback

Race-Neutral Measures

- Assist all small businesses
- Maximum feasible portion of goal

Race-Conscious Measures

- Focused specifically on assisting only DBEs
- Required to meet remaining portion of goal not met with R/N measures
 - *9th Circuit Court decision

Goal Setting Flash Back

Recipients in the 9th Circuit are **NOT Strictly Prohibited from Implementing Contract Goals (must meet certain requirements)**



See: Western States Paving Co. v. Washington Dept. of Transportation, 407 F. 3d 983 (9th Cir. 2005)

2014 Regulatory Requirements: Timeframe to Submit Information

- Responsiveness: Submit DBE Participation Information and/or GFE Documentation at Time Bid is Entered
- Responsibility: Submit DBE Participation Information/GFE Documentation up to 7 Days after Bid Opening and Before Contract Award (*changes to 5 days in January 2017*)

2014 Regulatory Requirements: Information Submitted

DBEs identify **appropriate** NAICS Codes to
Prime

- Complete and accurate information
- NAICS Code corresponds with the scope of contract (i.e., the work to be done by the DBE)

2014 Regulatory Requirements: Information Submitted

- DBEs identify **appropriate** NAICS Codes to Prime
- Prime Confirms DBE NAICS Codes and Submits **DBE information to Recipient:**
 - Identifying information (name, address, etc.)
 - NAICS codes matching work to be done
 - Amount of DBE subcontract
 - Written commitment from prime counter-signed by DBE

2014 Regulatory Requirements: Information Submitted

- DBEs identify appropriate NAICS Codes to Prime
- Prime Confirms DBE NAICS Codes and Submits DBE information; **OR**
- Prime Submits Sufficient Good Faith Efforts Documentation

2014 Regulatory Requirements: Information Submitted

Submit Sufficient GFEs

☐ Appendix A

- Scope, Appropriateness, and Intensity
- Active and Aggressive

☐ DBE and non-DBE subcontractor quotes when DBE was not selected to perform on contract

☐ Requesting DBE bids through mailings alone is not sufficient

2014 Regulatory Requirements: Recap

If the goal is not met...

Recipient	Contractor	DBE
Evaluate quality, quantity and intensity of the different kinds of efforts that the bidder has made	Provide Recipient with adequate documentation to show that it used “good faith efforts” to try and meet the goal	Provided timely and reasonable bid to prime and same requirements of lower-tier subs

2014 Regulatory Requirements: Terminating DBE Subcontracts

Prime Must Receive Written Consent from Recipient to Terminate

- ☐ If terminated or replaced without consent, contractor not entitled to payment for work performed



2014 Regulatory Requirements: Terminating DBE Subcontracts

- **Prime Must Receive Written Consent to Terminate**
 - ☐ If terminated or replaced without consent, prime not entitled to payment for work performed
- Document and Submit GFEs to Replace DBE within **“Reasonable Time”** after obtaining Approval to Terminate
 - ☐ Reasonable Time = 7 calendar days unless extended

2014 Regulatory Requirements: Monitoring Contract Clauses

Prime must make **DBE subcontracts available** to Recipient upon request

Subcontractors must ensure lower tier subcontracts **satisfy GFE provisions** (and all other Part 26 requirements)



2014 Regulatory Requirements: Monitoring Contract Clauses

Failure to comply is **material breach of contract**

- potential termination of contract or other remedies

DBE prime bidders

- count work DBE has committed to perform with **its own forces** and its DBE subs and suppliers



Evaluation Factors

Rigorous review of **documented GFE** **required**

- Review call logs
- Review faxes or emails
- Verify contacts were actually made!

Evaluation Factors

Did bidder make **enough work items available** to meet the goal?

Did bidder **solicit** available DBEs for work items?

- Did bidder follow up with specific DBEs?

Did **2nd & 3rd bidders** have more DBE commitments?

Evaluation Factors:

Amount of Work Available

What Specific Subcontracting Opportunities did the Prime Offer?

Evaluation Factors: Soliciting DBEs

- Solicitation must include specifics about the project
- Prime contact information
- Calls and follow-ups
- Meeting(s) with stakeholder groups that assist with recruitment and placement of DBEs

Evaluation Factors

Not being lowest price is insufficient reason to reject DBE -- most primes do not award on low bid alone

- Regulation does not allow rejection of DBE bids without sound reason
- Insufficient GFE if rejection of DBE bid is **only** because it wasn't the lowest received
- However, Prime is not required to accept unreasonable quotes in order to satisfy contract goals

Evaluation Factors

- Written solicitations should be sent to certified DBEs listed to do work made available by bidder (*See 49 CFR part 26, Appendix A, IV. A.*)
- Bidder must document solicitation
- Soliciting DBEs that do not do relevant work constitutes *pro forma* efforts
- Adequate time must be allowed for DBE to respond



Evaluation Factors

Solicitation information should include:

- Bidder's contact information – phone and fax number
- Project number
- Types of work made available
- Bid date and time



Evaluation Factors

Review performance of other bidders

- When apparent low bidder fails to meet the contract goal, but the second low bidder meets it, you may reasonably raise the question of whether, with additional efforts, the apparent low bidder could have met the goal

Evaluation Factors

- Clarify - work items/NAICS codes
- Verify - DBE quotes; solicitations; work items
- Question – Ask why (rejected DBEs)





Case Study 1: Construction



Contract is \$5M. Contract goal is 6%

Low bidder submits DBE commitment of 3.4% and documentation of GFE which reveals:

- Prime identified enough work items that if subcontracted would meet goal
- After soliciting DBEs, Prime uses non-DBE over DBE for landscaping, concrete, and electrical supplies due to price difference
- Prime uses non-DBE over a DBE for guardrail because, even though the DBE submitted a lower quote, the prime heard the DBE was difficult to work with
- After soliciting trucking from DBEs, Prime chose to self-perform \$50K trucking services because its drivers have had a slow season

Case Study 1: Construction



- **Electrical Supplies (Wire)**

DBE	\$15,660
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Non-DBE	\$13,746
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- **Landscaping**

DBE	\$6,828
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Non-DBE	\$4,350
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- **Concrete**

DBE	\$ 85,599
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Non-DBE	\$ 70,918
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- **Guardrail**

DBE	\$27,500
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Non-DBE	\$30,000
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Case Study 1: Construction



Q: How could the prime have improved its GFE?

Case Study 1: Construction



- ✓ Prime identified enough work items that if subcontracted would meet goal
- ✗ After soliciting DBEs, Prime uses non-DBE over DBE for landscaping, concrete, and electrical supplies due to price difference (*was that the sole factor?*)
- ✗ Prime uses non-DBE over a DBE for guardrail because, even though the DBE submitted a lower quote, the prime heard the DBE was difficult to work with
- ✗ After soliciting trucking from DBEs, Prime chose to self-perform \$50K trucking services because its drivers have had a slow season

Case Study 2: Design-Build



5-Year Design-Build Contract for \$1 Billion

Prime:

- Submits DBE commitment as a detailed plan
- Commits to specific DBEs, for specific types of work, for specific dollar amounts in Design and Construction
- Commits to use unspecified DBEs for specific work at an estimated dollar amount for work in which DBEs are available
- Identifies DBE work to be performed in each year of the contract

Case Study 2: Design-Build



- Prime:
 - commits to meeting 8% goal
 - hires a full-time employee to identify DBEs and host “meet and greet” and “matchmaking” events
 - has strict low bid policy—its corporate headquarters will not allow it to deviate
- Recipient was unaware of prime’s complex procurement practices
- At the beginning of year 3, prime reports it has attained 1.5% of the 8% goal

Case Study 2: Design-Build



- Prime assures Recipient goal will be met by end of contract period
- Recipient begins to receive complaints from DBEs that they have not been hired—passed over for lower bid

Effective Practices



Q: Which practices will help meet a DBE goal or document GFE?

- A. Prime hires employee to locate DBEs
- B. Routine monitoring of DBE participation
- C. Rely on prime's assurance to meet DBE goal
- D. Awareness of prime's procurement practices

Effective Practices



Q: Which practices will help meet a DBE goal or document GFE?

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GFE Written Decisions

- Draft a well-reasoned and thorough document on all Good Faith Efforts decisions
- Thorough, reasonable, and well-written Good Faith Efforts decisions are difficult to challenge because the decision maker is given latitude to weigh a variety of factors in reaching his or her conclusion

GFE Written Decisions - Example

Key Components of a Comprehensive Written Decision

- Description of Project, Contract Number, Location, etc.

Prime Contractor:	ABC Prime
Bid Amount:	\$934,772.50
Contract Goal:	\$ 56,086.35 (6%)
Amount Achieved	\$ 31,621.35 (3.4%)
Difference:	\$ 24,465.00 (2.6%)

- List DBE quotes accepted by price/work item
- List DBE quotes rejected by price/work item
- List Non-DBEs quotes accepted by price/work item

GFE Written Decisions

Analysis: What Evidence did Bidder Submit?

Address each area, and explain why Bidder was or was not successful:

- Selected Portions of Work to be Performed By DBEs
- Solicitation and Follow-Up; Timeliness
- Negotiated in Good Faith with Interested DBEs
- Made Plans Available; Assisted with Bonding, etc.
- Contacted the UCP for Assistance in Locating DBEs
- Performance of Other Bidders

GFE Written Decisions

If it is determined bidder did not meet goal but **GFEs are ADEQUATE:**

- Write a detailed memo to support decision—respond to other bidders and DBE complaints
- Note if other bidders were also unable to meet goal
- Identify good practices by bidder: effective solicitation; outreach; negotiations, etc.
- Describe how low bidder's efforts differ from others with different outcomes

GFE Written Decisions

If it is determined bidder did not meet goal but **GFEs are INADEQUATE:**

- Write a detailed memo to support decision during reconsideration process
- Analyze all quotes; compare quotes when non-DBE chosen over DBE due to cost; create charts
- Discuss how other bidders were able to meet goal
- Identify procurement practices that created barriers

Conclusion

A contract that was awarded to a bidder who **did not meet the goal or demonstrate adequate good faith efforts** is **ineligible** for Federal participation.

2011 DBE Regulatory Requirements

If the awards and commitments shown on your Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must prepare a Shortfall Analysis and Corrective Action Plan

Uniform Report of Awards and Commitments or End of FY Commitments and Payments *less than* Triennial DBE Goal Percentage = **Shortfall**

DBE Shortfall Elements

- ❑ Analyze *in detail* the reasons for the difference between the overall goal and your awards and commitments in that fiscal year
- ❑ Establish *specific steps* and milestones to correct the problems identified in your analysis and to enable you to meet fully your goal for the new fiscal year

The End!

Q & A

Federal Aviation Administration-Office of Civil Rights
http://www.faa.gov/about/office_org/headquarters_offices/acr/